Legislative BULLETIN

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Marathon Hearing on Equipment Tax Repeal

The Taxation Committee hosted a six hour public hearing on Thursday this week on LD 2056, *An Act to Replace Municipal Revenues Subject to Business Equipment Property Tax Exemption*.

LD 2056 is a bill sponsored by Rep. David Bowles (Sanford) that would prospectively repeal the personal property tax. The legislation is substantially the same as its immediate predecessor, LD 1660, which was submitted to the Legislature last year, carried over into this legislative session, and has now morphed into LD 2056.

In summary, LD 2056 would prospectively repeal 10% of the municipal tax base (all personal property, essentially, with the exception of utilities property, gambling machines, and the personal property of retail stores over 100,000 square feet in size) and reimburse municipalities for 50% of their lost property tax revenue as required by Maine's Constitution. LD 2056 would also provide a couple of supplementary statutory reimbursements over the required 50% level that would kick-in under certain circumstances.

The marathon public hearing drew out the Department of Economic and Community Development along with 17 general public proponents for LD 2056 and 19 opponents testifying from the general public.

The business-oriented proponents consisted of employees from National Semiconductor (South Portland), Tambrands (Auburn), Lincoln Pulp and Paper (Lincoln), Domtar (Baileyville), Fraser Paper (Madawaska), McCains Food (Easton), Barber Foods (Portland), Bath Iron Works (Bath), Unum (Portland), a machine shop (Auburn), Maine Forest Products Council, Androscoggin County Chamber of Commerce, and a couple of businesses that provide support services like snow plowing and security services to the larger industrial corporations.

The opponents were councilors, mayors, selectmen, town and city managers, assessors and economic development directors from Jay, Solon, Portland, Madawaska, Bucksport, Livermore Falls, Augusta, Boothbay, Skowhegan, and Madison, as well as the Chiefs of Police Association, the Steel Workers' Union,

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Home Rule Authority at Risk

The first legislative debate on LD 1481, *An Act to Amend the Laws Governing the Enactment Procedures for Ordinances*, is scheduled to take place in the ***Senate on Tuesday, March 21st.***

As amended by the State and Local Government Committee, LD 1481 would prohibit municipalities from nullifying a municipal land use permit through the enactment, amendment or repeal of a local ordinance after a developer has received final municipal permits and 30-day waiting period has passed.

In other words, a municipality (or its citizens through the petition process) have 30 days after a developer has been locally permitted to amend the ordinance in a manner that impacts that particular development. Once the 30-day period has expired municipalities cannot impact that development. (Note: An amendment to the State and Local Government Committee's version of LD 1481 has been filed by Senator Elizabeth Schneider (Penobscot Cty.). Senator Schneider's amendment proposes to extend the 30-day waiting period to 45 days.)

Municipal officials find it troubling that the Legislature wants to attack the ordinance adoption authority of Maine's municipalities and the citizens' rights that are part and parcel of what we call "home rule". The time it takes to amend a municipal ordinance, which sometimes involves amending the comprehensive plan as well, can take longer than it takes to obtain a municipal permit. When major development proposals are introduced in a community, the practice of setting the effective date of an ordinance change can ultimately result in that date being considered "retroactive" to the permitting date.

The Legislature frequently enacts laws with retroactive provisions. The last major retroactive law with municipal implications was LD 1, which implemented the 50% unreimbursed homestead property tax exemption retroactively to the previous April 1. Now the Legislature is seeking to prohibit municipalities and their citizens from adopting local laws and ordinances in a similar fashion. The sauce for the goose should be the sauce for the gander, as they say. Please take an opportunity over the weekend to contact your State Senator and ask them to oppose LD 1481.

MARATHON (cont'd)

the County Commissioners Association, the Main Street Skowhegan Program, the Maine Municipal Association, and a citizen unaffiliated with any of the local government or labor union opponents.

The proponents testimony is summed up as jobs, stability and business climate. The tax on business' personal property was described as a tax on investment that depresses job creation and threatens job retention. The reported same-day closure of the Georgia Pacific paper mill in Old Town was frequently referenced as a reminder for the need to repeal the tax. The proponents argued that the ten year old BETR program needs to be converted into a permanent exemption because of the demands of corporate offices in distant locations that apparently give no credence to tax incentive programs, especially when those incentives (like BETR) suffer annual adjustments or threats of adjustments by state legislatures.

The business climate argument was advanced by the smaller company proponents, who testified that their businesses depended on the health of the big industries which they served in a variety of ways.

The proponents' arguments were very thin on the actual details of LD 2056 or its impacts. The proponents have not provided any detailed impact analysis of LD 2056. Both the Administration's Department of Economic and Community Development and the general public proponents were apparently convinced that the actual impacts of LD 2056 on municipalities would either be small, non-existent or actually financially advantageous to Maine's towns and cites. By exempting the tax, the argument goes, the resulting surge in unimpeded investments would generate business activity that would more than compensate for projected tax revenue reductions on paper. By reducing the availability of revenue that supports the host communities, you actually generate tax revenue, or so the theory goes.

The opponents' testimony focused on:

- the actual mechanical details of LD 2056;
- the real and in some cases serious cuts to municipal revenue in a relatively short period of time;
- the lousy public policy of giving Wal Mart stores, Exxon gas stations, and corporate law offices unsolicited tax breaks;
- shifting the property tax burden to Maine's residents;
- the complete absence in LD 2056 of the smallest shred of true tax reform or structural reform; and
- the degree to which LD 2056 would impair the municipal working relationship with, and community attitudes toward, local industrial investments.

Bucksport's Mayor Jeff Robinson described LD 2056 as a "reverse Robin Hood" proposal that provides a deep tax exemption to some companies, while asking financially-strapped homeowners to contribute more to the common good. North Berwick's Dwayne Morin criticized LD 2056 for pitting the municipalities against their local businesses which the municipal leaders otherwise strongly support in their day-today work at the local level.

Nearly every municipal leader that gave testimony either directly expressed or conveyed by implication the fact that LD 2056 does not represent a true collaborative effort between the business interests and the affected local governments, and they begged the Committee to put an end to that unilateral dynamic.

MMA's testimony focused on two areas of the debate.

First, there is an absolute need for a quality impact analysis for any proposal of this magnitude. Just claiming that the negative impacts of an enormous tax exemption will be minimal and otherwise swallowed up whole by a new vibrant economy is simply not enough. If we should take it on faith that that is the case, why doesn't the state do a pilot project by exempting 10% of its tax base?

MMA has done a sophisticated impact analysis that assumes LD 2056 was enacted in 1995, instead of the BETR program, and then follows the impacts through to 2004. That analysis takes into account the changes in valuation, the 50% constitutional reimbursement, the shifts in county subsidy and the shifts in education funding, and the results are very unattractive to the municipalities because of the compression of the tax base and subsequent increase in property tax rates. Every town's tax rates would be higher, and some would be substantially higher. The proponents' argument of a more dynamic economy do not pertain very well, because the BETR program has provided the identical dynamic over the ten-year period of the analysis.

MMA also described in some detail the alternative, so-called "jail swap" proposal a group of municipal officials developed in January at the request of legislative leadership, and presented on January 26 to a LD 2056 working group made up of legislators and business lobbyists. This alternative proposal achieves the core economic development goals of LD 2056 without the adverse consequences and deep uncertainties with respect to impact. That proposal was described in the February 17th edition of the *Legislative Bulletin*. The legislators working on the development of LD 2056 rejected the municipality's jail-swap proposal back in January.

The six weary members of the Taxation Committee who managed to weather the entire six hour public hearing were very attentive about the proposal and seemed intrigued, but there is a mountain of collaboration and much more than a month of work involved before the concept in the jail swap idea could be fully detailed. MMA's suggestion was to put the right "joint select" legislative committee together and charge it with crafting the responsible plan with predictable impacts.

The basic structure of the reform plan has at least been laid clearly on the table. It is, at this time, very hard to predict the Legislature's response.

Legislative Bulletin

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Editorial Staff: Geoffrey Herman, Kate Dufour, Jeff Austin, and Laura Veilleux of the State & Federal Relations staff.

Constitutional Amendment Proposed for Citizen Initiative Process

On Monday of this week, two-thirds (eight members) of the Legal and Veterans Affairs Committee voted to support an amended version of LD 2033, *Resolution, Proposing an Amendment to the Constitution of Maine to Clarify Deadlines for Submitting Direct Initiatives to Municipal Officials for Signature Verification.* Four Committee members voted "ought not to pass".

As amended, LD 2033 proposes to make three significant changes to the way the Constitution regulates the citizen initiative process. In order of importance, the bill would: 1) clarify the deadline for submitting petitions to municipal clerks for signature verification; 2) address an ambiguity between the constitutional and statutory deadlines by moving all petitioner related deadlines into the Constitution; and 3) amend the language in the Constitution that requires clerks to *return* verified signatures to the petitioners.

Although LD 2033 has cleared its first barrier (i.e. the Committee vote), two significantly more challenging hurdles lie ahead.

The next hurdle will require a two-thirds majority vote of both the House and the Senate. While in the aggregate the super majority vote of support from the Committee on LD 2033 is encouraging, the vote from the Senate members on the Committee may signal the bill's chances of success. Of the three Senate members serving on the Legal and Veterans Affairs Committee, only one member supported the amended bill. Without the support of the two other Senators, it is unlikely that the bill will receive a two-thirds majority vote from the Senate. Absent that level of support from the Senate, the bill will die.

On the chance that the LD 2033 survives the legislative process, the voters of Maine will be asked to vote on the constitutional amendment this November (2006). If approved by the voters, the changes proposed in LD 2033 would become law.

Clerk Signature Verification

One of the most important changes found in LD 2033 is the proposal to clarify the deadline for petitioners to submit collected signatures to the municipal clerk. The clerks have an important role in the citizen initiative process as they provide the first level of signature review. Clerks are responsible for guaranteeing that all of the signatures on the petitions are obtained from registered voters in the community. While clerks are willing to participate in the process, they need enough time to do the job properly.

As currently provided in the Constitution, petitioners are required to submit collected signatures to the municipal clerk ten days before the signatures must be submitted to the Secretary of State's Office (Secretary). Once submitted, the municipal clerk has five days to certify that the signatures belong to registered voters. Although the Constitution clearly provides a deadline, the provision does not have an enforceable "or else" clause. Nothing in the Constitution establishes what happens if petition circulators miss the deadline for submitting signatures to the municipal clerk. LD 2033 proposes to remedy that problem by adding a provision in the Constitution that prevents municipal clerks from verifying signatures submitted after the 10-day deadline.

Submission Deadlines

As discussed in several editions of the *Legislative Bulletin*, there are two important deadlines that guide the citizen initiative process. One of the deadlines is found in the Constitution, the other in Maine's statutory law.

The constitutional deadline serves the function of letting petitioners know when they must submit the signatures to the Secretary of State's Office in order to get the initiative before a certain Legislature. That provision of the Constitution requires that the petitions must be submitted to the Secretary no later than 50 days after the convening of the Legislature in its First Regular Session (in an odd numbered year) or no later than 25 days of the convening of the Legislature in its Second Regular Session (in an even numbered year).

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TABOR Trial Date Set

Next Friday, March 24th, the trial over Secretary of State Mathew Dunlap's decision on the citizen initiative seeking to establish the so-called Taxpayers Bill of Rights (TABOR) is set to begin at 11:00 am in Kennebec County Superior Court. The Honorable Donald Marden will be presiding over the trial.

The Secretary's decision to count all of the signatures submitted by the TABOR petitioners is being challenged because over 4,000 signatures were submitted to the Secretary after the statutorily defined deadline, which for the TABOR petition was on October 21, 2005. Without those after-deadline signatures, the proponents of the TABOR initiative would not have had enough signatures to send the issue to the voters of Maine. As provided for in Title 21-A, Section 905(2), the trial of a challenge of the decision of the Secretary of State is required to start within 15 days of the date of the questionable decision.

In a letter that appeared in the March 14, 2006 House Calendar, Secretary Dunlap informed the members of the Legislature of his February 21, 2006 decision to certify the TABOR petition. In that communication the Secretary states that the Superior Court will be rendering a decision over the challenge by April 7, 2006, but also notes that the interested parties can appeal that decision to the Supreme Judicial Court. In other words, although Secretary Dunlap has verified the TABOR signatures as valid, it may be a while before the initiative clears both the judicial process and the legislative process and we know for sure when and whether TABOR will be on the ballot.

In the meantime, TABOR has been printed as an actual bill. It is LD 2075.

INITIATIVE (cont'd)

The statutory deadline serves an administrative function and also ensures that petitioners will not hold onto the petition for an indefinite period of time. As required by Title 21-A, Section 903-A, citizens must turn in their petitions within one year of the date the Secretary of State issues the certified petition to the petitioners for circulation.

LD 2033 proposes to clarify existing laws by amending and moving the statutory deadline into the Constitution. As proposed, petitioners would be authorized to submit signatures to the Secretary within 25 or 50 days after the convening of the Legislature (depending on the legislative session), *provided that the petition is filed within eighteen months of being furnished and approved by the Secretary*. In other words, petitioners would have 18 months to collect signatures. However, no signature older than one year would be deemed valid, as currently required in the Constitution.

If this element of LD 2033 had been enacted in January, the trouble over the TABOR certification would have been avoided. By having all submission and circulation deadlines established in the Constitution, the Secretary of State would have been more comfortable in giving each deadline equal weight. However, since the TABOR petitioners missed the statutory deadline and not the constitutional deadline, the Secretary felt that the deadline found in the Constitution should be given deference. As a result, all of the TABOR petition signatures were counted, including the over 4,000 signatures that were submitted after the statutory deadline.

Return vs. Notify Debate

LD 2033 also proposes to change the way in which municipal clerks inform petitioners that signatures have been verified. As currently required in the Constitution, municipal clerks are required to complete the signature certification process in five days and ***return*** the signatures to the petitioners. The amendment to the Constitution seeks to relieve the clerks of that responsibility by requiring the clerks to ***notify*** the petitioners that the submitted signatures have been certified.

Interestingly, it is this section of the bill that generated the most debate and discussion at Tuesday's work session on LD 2033. Members of the Committee favoring the change believe that the responsibility for keeping track of the collected signatures rightfully belongs with the petitioners.

Sen. Debra Plowman (Penobscot Cty.), one of the more vocal opponents to the change, expressed concern that the amendment would preclude petitioners from arranging with municipal clerks to mail the certified petitions in a petitioner-provided postage paid envelope. She suggested that clerks were not currently abiding by the procedure set in the Constitution and should be made aware of the "return" requirement.

MMA staff disagrees with Sen. Plowman's assessment that municipal clerks are not abiding by the constitutional requirement to "return" petitions. At the same time, as the citizen initiative process continues to grow in popularity, additional burdens will be placed on municipal clerks. The purpose of the proposed amendment is to ensure that municipal officials expend limited resources on the most important issues.

It is clear, however, that without the unanimous support of the Legal and Veterans Affairs Committee, LD 2033 may not survive the legislative process. As a general rule, legislators are uncomfortable supporting bills to amend the Constitution. To get a two-thirds majority vote of Legislature, members must be comfortable and convinced that the proposed changes are necessary. MMA believes that the changes in LD 2033 seeking to: 1) clarify when petitioners must submit signatures to the municipal clerk; and 2) move what is now the administrative statutory circulation deadline into the Constitution are of utmost importance. For that reason, MMA urges support for an amended version of LD 2033 that focuses on those two important issues.

Energy Efficiency Update

The Utilities and Energy Committee's work on LD 1931, *An Act To Encourage Energy Independence* has wrapped up. As drafted, the bill had 9 semi-independent parts that touched on energy efficiency related issues.

There are three parts of the bill that were of some concern to municipalities. The first sought to promote energy efficiency by mandating that school facilities managers complete state-offered training on energy efficiency. The training is a good idea and has helped many building managers operate in a more energy efficient manner. However, mandating the training for this one segment of the management world was troubling. As amended, the bill would seek to promote managers' participation in this program through incentives.

A second element in the bill would have switched the current energy code adoption policy from one where towns opt-in to one where they opt-out. That is, instead of being left to adopt the code or not, municipalities would be forced to adopt the energy code unless they specifically sent a letter to the state indicating they would not adopt the energy code. Fortunately, the Committee has agreed to remove the mandatory opt-in approach.

Municipalities have long supported greater outreach and education on energy codes rather than a statutory deadline. It appears that more education on the benefits as well as the workload burden relative to energy codes could help encourage towns to consider adoption of the code.

Lastly, municipalities were concerned with a provision that would have doubled the current efficiency fee charged on electric rates that funds the Efficiency Maine program. Municipalities don't have an objection to the Efficiency Maine program and local governments have even benefited from Efficiency Maine grants. The problem is simply that so many costs, particularly related to energy, are rising and straining local budgets that government-created increases should only be implemented if absolutely necessary. The Committee did not drop the idea of increasing the fee but instead directed major substantive rulemaking on the subject.

Eminent Domain Update

The Judiciary Committee reported out two bills on eminent domain and continues to work on a third. The first bill reported out is LD 1203, *An Act to Amend the Laws Concerning Eminent Domain*. It has replaced LD 1297, *An Act to Provide Just Compensation for Established Businesses During Eminent Domain Proceedings*, which until this week was the vehicle that was being debated regarding the amount of compensation a business should receive as the result of an eminent domain taking.

Regardless of the vehicle used, the Committee has essentially taken a compromise approach on the issue of compensation. The original bill had three elements: (1) an increase in relocation benefits paid by the Department of Transportation to businesses which are impacted by a taking, (2) the creation of a new benefit based upon the damage to a business' goodwill, and, (3) application of both of these items to municipal takings for the first time.

The Committee is recommending an increase in relocation benefits, no benefits for goodwill and having municipalities make relocation benefit payments.

There are two formulas that a business can choose from to receive relocation benefits. The first includes actual search and relocation costs. The current cap on the amount that DOT has to reimburse a business because of these costs is $11,000; the bill would increase that cap to $27,500.

An alternative formula allows a business to request a payment equal to the average net earnings of the business over the past two years. The cap on that payment is currently $25,000 and the original draft of the bill proposed doubling the cap to $50,000. In exchange for dropping the goodwill element of the bill, the Committee further amended the bill to increase this cap to $100,000. Accordingly, any business taken as a result of eminent domain, may put in a claim for relocation damages equal to their average net earnings over the past two years, up to a maximum of $100,000.

The Committee will make these payments an obligation for municipalities who take property pursuant to certain municipal takings.

In the end, the Committee was very determined to increase the payment that businesses receive if they suffer an eminent domain taking and make municipalities subject to these rules. However, the Committee also seemed to appreciate the complexity of basing that increased benefit on the concept of business goodwill, and decided to use the existing relocation benefits process instead.

The Committee also finalized its work on LD 1870, *An Act To Clarify Laws Governing Eminent Domain.* This bill is the state's response to the Supreme Court's *Kelo* decision. The legislation will prohibit the taking of property where the purpose of the taking is to increase tax revenue or in order to transfer the property to a private business or citizen. The details of this bill were previously reviewed in the *Legislative Bulletin* on March 3, 2006.

The third bill which the Committee continues to wrestle with is LD 1904, *An Act To Protect Businesses from Unnecessary Eminent Domain Takings*, filed by Rep. Barbara Merrill (Appleton). Where the other two bills are fairly specific and address particular issues, this bill is more general and sweeping in its nature.

The bill attempts to give life to a fairly dormant element of the Maine Constitutional limits on eminent domain. Article I, Section 21 of the Maine Constitution reads, "*private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it*." The elements of "public uses" and "just compensation" have been well litigated for years. The "public exigency," or "pressing necessity" test has not received much attention by the courts.

Its not for lack of trying though. Many property owners have brought court challenges alleging a lack of public exigency. However, as Representative Merrill pointed out to the Committee, the courts have generally not accepted the invitation to review the necessity of a taking and these challenges have been mostly unsuccessful.

What the Judiciary Committee has not fully been told is why the courts stay out of these "exigency" disputes. Following are some comments of the Maine Law Court in response to public exigency challenges:

"*Whether there is such an exigency – whether it is wise and expedient or necessary that the right of eminent domain should be exercised, rests solely within the determination of the Legislature*."

"W*hen the legislature undertakes to take particular land for public purposes the determination of necessity is a political question for the legislature alone*."

What is most interesting from the local perspective is that municipalities don't always declare the existence of the exigency. The state Legislature grants the power of eminent domain to the municipalities. Often, the Legislature makes the declaration of necessity in the statute granting the power. One-hundred years ago, in a case involving a taking for a library parking lot, the Court held that "*the exigency or necessity is established by the enactment of the statute authorizing the taking. It will therefore be observed that the municipal officers do not pass upon the question of necessity. That has already been done by the legislature before their duties begin*."

What LD 1904 attempts to do is drag the courts into the policymaking arena and have the Justices second-guess the Legislature's determinations of necessity. As drafted, the Courts would likely continue to resist playing this role. The bill is clear on the overall goal, that the courts should review the necessity of the taking. However, it is very short on how the courts should perform this function.

The only aspect of the legislation that really approaches guidance is the following "*In determining necessity, the court shall balance the need to accomplish the public purpose against the finding by the Maine legislature that the preservation of jobs and Maine businesses is a high priority to the state*."

Imagine you are a judge and a case comes before you where a gas station property is taken so that a fire station can be located on the parcel. How does the court determine necessity? These kinds of decisions involving where to locate a new fire station, town hall or new school

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Road Issues

On Thursday of last week (March 9th), Governor Baldacci announced that he was submitting legislation for a $25 million General Fund bond to help alleviate the $90 million Highway Fund shortfall. The submission of the legislation is in response to the recommendations of the Governor's Capital Transportation Funding Working Group.

The Working Group, including representatives from the Legislature, the Department of Transportation, the Maine Better Transportation Association, Maine Municipal Association, Maine State Chamber of Commerce, Maine Turnpike Association, and the Associated Constructors of Maine, recommended two strategies for addressing the $90 million gap.

The Working Group recommended that one-third of the shortfall ($30 million) be funded through cash allocations to be shared equally between the state's Highway and General Funds. The Working Group also recommended that the remaining two-thirds of the shortfall ($60 million) be funded through bonds.

While the $25 million General Fund bond request will only address 30% of the funding shortfall, it is a good start. Unless otherwise remedied, the FY 06-07 biennial shortfall will require that over 100 municipal projects are deferred until FY 08-09. The deferred projects range in scope from road resurfacing and bridge painting projects to road reconstruction and walking trail development projects. (A list of the deferred projects can be found at the following address: http://www.state.me.us/mdot/planning-documents/planning-docs-home.php).

Please contact your legislators and encourage them to support the $25 million General Fund bond.

EMINENT (cont'd)

are often contentious, and well-debated locally. The court will have no guiding principles, other than their personal opinions, about whether the taking was necessary. Despite the claims of partisans on both sides, courts are generally very hesitant to substitute their policy judgment for that of the duly elected representatives.

While it is hard to disagree with the principle articulated by the bill – that takings should only occur when necessary – the courts seem to have the right idea that the appropriate forum for disputing the necessity of a taking is the legislative body, not the courts.

LEGISLATIVE HEARINGS

Monday, March 20

Criminal Justice & Public Safety
Rm. 436, State House, 10:00 a.m.
Tel: 287-1122

LD 2044 – An Act To Enhance the Protection of Maine Families from Terrorism and Natural Disasters. (Emergency) (Reported by Sen. Strimling of Cumberland for the Task Force to Study Maine's Homeland Security Needs.)

Legal & Veterans Affairs
Room 437, State House, 11:30 a.m.
Tel: 287-1310

LD 2067 – Resolve, Regarding Legislative Review of Portions of Chapter 520: Rules Regarding Publication of Public Comments on Statewide Referenda, a Major Substantive Rule of the Department of the Secretary of State, Bureau of Corporations, Elections and Commissions. (Emergency) (Reported by Rep. Patrick of Rumford for the Department of the Secretary of State, Bureau of Elections and Commissions.)

Tuesday, March 21

Inland Fisheries & Wildlife
Rm 206, Cross State Office Bldg, 1:00 p.m.
Tel: 287-1338

LD 2057 – An Act To Implement the Recommendations of the ATV Trail Advisory Council. (Presented by Rep. Watson of Bath for the Joint Standing Committee on Inland Fisheries and Wildlife.)

Transportation
Room 126, State House, 1:00 p.m.
Tel: 287-4148

LD 2058 – An Act To Allow Heavy Equipment To Be Moved during Nighttime. (Sponsored by Rep. Jackson of Allagash; additional cosponsors.)

IN THE HOPPER

Transportation

LD 2058 – An Act To Allow Heavy Equipment To Be Moved during Nighttime. (Sponsored by Rep. Jackson of Allagash; additional cosponsors.)

This bill would exempt vehicles used in Aroostook and Penobscot counties for the trucking of equipment used in timber harvesting operations from road postings or road weight limits provided the vehicles are driven on the roads at night.